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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

GREGORY BERRY, PHILLIP MARCUS, DENNIS MCALLISTER and FRANCIS ORAVETZ,
Petitioners,
v.
COUNTY OF SONOMA, SONOMA COUNTY SHERIFF'S DEPARTMENT, SONOMA COUNTY BOARD OF SUPERVISORS, JANET NICHOLAS, JAMES HARBERSON, TIM SMITH, NICK ESPOSITO, ERNEST CARPENTER and RICHARD MICHAELSON,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC IN SUPPORT OF PETITIONER

PROF. CRAIG BECKER
UCLA Law School
405 Hilgard Avenue
Los Angeles, CA 90024-1476

JONATHAN P. HIATT *
LARRY ENGELSTEIN
SEIU Legal Department
1313 L Street, N.W.
Washington, D.C. 20005
(202) 898-3451
Attorneys for Amicus Curiae
* Counsel of Record

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BRIEF OF *AMICUS CURIAE* SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC IN SUPPORT OF PETITIONER

The Service Employees International Union, AFL-CIO, CLC respectfully submits this brief with the consent of the parties as *amicus curiae* in support of the petition for certiorari.

INTEREST OF *AMICUS CURIAE*

The Service Employees International Union (SEIU) is a labor organization with approximately one million members in the United States. It is the fourth largest

union in the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO).

SEIU represents many service sector employees such as home health aides, nursing home workers, and janitors. Many of SEIU's members are low-wage workers who depend on active enforcement and strict construction of the Fair Labor Standards Act to insure that they earn wages that are minimally adequate to support their families.

In the rapidly changing and highly competitive service sector, SEIU members are increasingly required to remain ready to return to work when they are not on active duty and to suffer accompanying restrictions of their liberty. For example, hospital workers that SEIU represents have much in common with the coroners in this case. Both have jobs in which the workload depends upon the unpredictable nature of human tragedies. Hospitals administrators, with increasing frequency, place workers on call and impose various types of restrictions on their movement and activities to insure that they will be able to respond to an emergency rather than having them remain in the hospital. Throughout the service sector, more and more workers are no longer reporting to a workplace outside their home and remaining there for a fixed shift each day. Over 15% of American workers work flexible schedules and almost 20% perform job-related duties at home. *See,* Commission on the Future of Worker-Management Relations, Fact Finding Report 20 (1994). Yet what appears on the surface to be a trend toward greater flexibility also involves increased constraints on workers; more and more workers are being required to remain available for work on a continuous basis. *See,* Reed, *Be Wary of Beeper Bondage,* New York Times, April 17, 1994, Sec. 3, at 13, col. 3.

SEIU therefore has a great interest in urging this Court to grant certiorari because the Ninth Circuit's decision undermines the FLSA's protection of the many union members who are required to perform standby duties.

ARGUMENT

THERE IS A DIRECT CONFLICT BETWEEN THIS COURT'S DECISIONS IN *BARRENTINE* AND *SKIDMORE*

The Ninth Circuit's decision in this case is just one example of the confusion among the lower federal courts and the state courts concerning the significance of collective bargaining agreements and agreements between individual workers and their employers in determining whether standby time is work. This confusion is the result of a direct conflict between this Court's decisions in *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

In *Skidmore* and its companion case *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), this Court considered the questions of whether waiting time could be classified as work for purposes of the FLSA and, if so, how to determine when waiting time should be so classified. After resolving the first question in the affirmative, this Court instructed trial courts on how to resolve the second. This Court stated that categorization of standby time as work or nonwork "involves scrutiny and construction of the agreements between the particular parties." *Skidmore*, 323 U.S. at 137.*

Relying on this instruction, the Ninth Circuit and numerous other lower courts have held that parties can agree that waiting time is not work time. *See, e.g., Berry v. County of Sonoma*, 30 F.3d 1174, 1180-82 (9th Cir. 1994), Pet. App. 7a-11a; *Owens v. Local No. 169*, 971 F.2d 347, 354-55 (9th Cir. 1992); *Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1248 (5th Cir. 1986), *cert. denied*, 484 U.S. 827 (1987); *Allen v. Atlantic Richfield Co.*, 724 F.2d 1131, 1134 (5th Cir.

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* This language is quoted in the Department of Labor's waiting time regulations. 29 C.F.R. § 785.14.

1984); *Bowers v. Remington Rand, Inc.*, 159 F.2d 114, 116-17 (7th Cir. 1946), *cert. denied*, 330 U.S. 843 (1947). The Ninth Circuit in this case stated that the agreement between the parties is "one of the predominant factors to be considered in determining whether the employees' on-call waiting time is compensable." *Berry*, 30 F.3d at 1180, Pet. App. 7a. Many courts, including the Ninth Circuit in this case, have also held that this agreement need not even be between individual workers and their employer, but may be between a union and an employer. *See, e.g., id.; Owens*, 971 F.2d at 355. In fact, some courts have held that this agreement need not even be express, but may be implied from employees' continued abidance of the waiting time restrictions in the absence of compensation according with the FLSA. *See, e.g., Berry*, 30 F.3d at 1180-81, Pet. App. at 8a-9a; *Owens*, 971 F.2d at 355; *Rousseau*, 805 F.2d at 1248.

The lower courts' construction of *Skidmore*, as exemplified by the Ninth Circuit decision in this case, conflicts with this Court's more recent holding in *Barrentine*. In *Barrentine*, this Court held that a union cannot waive workers' rights under the FLSA. This Court reasoned, "FLSA rights . . . are independent of the collective-bargaining process. They devolve on [employees] as individual workers, not as members of a collective organization." 450 U.S. at 745. Therefore, this Court held, "congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement." *Id.* at 740-41. This Court held in *Barrentine* that a union could not agree that truck drivers conducting pre-trip inspections were not performing "work" for purposes of the FLSA. It would seem to follow logically that a union also may not agree that the same employees' waiting time is not "work" and therefore that the employees lawfully may be paid nothing for their time.

In fact, the logic of *Barrentine* is particularly strong as applied to waiting time because unions like SEIU often

represent large units of workers, only a few of whom are required to be on-call. The pressures of majority rule may thus lead unions to trade-off the individual statutory right of the minority to be paid for waiting time in order to gain benefits for the majority. As this Court reasoned, "a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." *Barrentine*, 450 U.S. at 742. The majority should not be allowed to trade-off the minority's statutory rights, this Court held in *Barrentine*.

Even if *Skidmore* is construed to refer lower courts only to agreements between individual workers and their employers, it is still in tension with *Barrentine*. In *Barrentine*, this Court reaffirmed the "nonwaivable" nature of the rights to a minimum wage and overtime compensation: "FLSA rights cannot be abridged by contract or otherwise waived." *Id.* at 740. Yet lower courts have read *Skidmore* to hold that employees can effectively waive their FLSA rights by agreeing that waiting time is not work.

In this case, the Ninth Circuit attempted to resolve the tension in this Court's case law when it stated, "Our emphasis o[n] the parties' agreement as a predominant factor is not intended to suggest that agreements are controlling regardless of the character of the uncompensated time at issue." *Berry*, 30 F.3d at 1181, Pet. App. at 8a. Where there is "no uncertainty that the uncompensated time at issue . . . was actually work," the Court agreed that "the FLSA was not designed to perpetuate contracts pursuant to which employers fail to compensate employees for work." *Id.* But where there are "serious doubts as to whether certain activity or non-activity constitutes work . . . the parties' agreements are persuasive evidence." *Id.*

The problem with this proposed resolution of the tension is that virtually all jobs involve some waiting time.

A receptionist waits for the phone to ring, a secretary waits for typing assignments, a hospital orderly waits for an operation to be completed. Although this case involves off-premises waiting-time, the lower courts have applied the reasoning in *Skidmore* to find time when employees are required to remain on the employer's premises not to be work. *See, e.g., Rousseau,* 805 F.2d at 1248; *Allen,* 724 F.2d at 1134. *Cf. Service Employees International Union, Local 102 v. County of San Diego,* 35 F.3d 483, 490 (9th Cir. 1994) (relying on provision of compensation in collective bargaining agreement to support holding that on-site standby duty was work).

If, under *Skidmore,* employees can agree that such waiting time is not work for which they must be compensated in accordance with the FLSA, then employers can undermine this Court's holding in *Barrentine.* By obtaining employees' agreement that waiting time is not work, employers can obtain what this Court forbids in *Barrentine*—a binding waiver of employees' statutory right to be paid a minimum wage and premium compensation for overtime.

CONCLUSION

Barrentine and *Skidmore* are in direct conflict. This conflict has created confusion and unfairness in the lower courts. This Court should grant certiorari in this case in order to make clear that *Barrentine* overruled *Skidmore* or to otherwise reconcile these inconsistent holdings.

Respectfully submitted,

PROF. CRAIG BECKER
UCLA Law School
405 Hilgard Avenue
Los Angeles, CA 90024-1476

JONATHAN P. HIATT *
LARRY ENGELSTEIN
SEIU Legal Department
1313 L Street, N.W.
Washington, D.C. 20005
(202) 898-3451
Attorneys for Amicus Curiae
* Counsel of Record